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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 702

ALLEN I. NILVA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 5-15) is reported at 227 F. 2d 74. Its opinion on petition for rehearing (Pet. App. 16a-18a) is not yet reported. A memorandum opinion of the District Court (Pet. App. 1a-4a) is reported at 228 F. 2d 134.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955, and a petition for rehearing was denied on December 21, 1955 (Pet. App. 16a-18a). On January 16, 1956, the time

for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 18, 1956. The petition for a writ of certiorari was filed on February 17, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The dispositive issue is whether there was sufficient competent evidence to sustain petitioner's conviction for criminal contempt, under Rule 42 (b) of the Federal Rules of Criminal Procedure, on the third of the three separate specifications on which he was found guilty.

STATUTE AND RULES INVOLVED

18 U. S. C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Pertinent Federal Rules of Criminal Procedure are as follows:

Rule 17. *Subpoena.*

* * * * *

(c) **FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

(g) **CONTEMPT.** Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issues if it was issued by a commissioner.

Rule 42. *Criminal Contempt.*

(a) **SUMMARY DISPOSITION.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall

records would be produced, Paster's counsel stated that this would be done the following day [April 1] (R. 5).

On April 1, 1954, petitioner, who was an attorney and vice-president of Mayflower, voluntarily appeared in answer to the two subpoenas duces tecum and the order to produce forthwith, and testified that he had "brought all the records that [he] could that those subpoenaes [sic] asked for" (R. 8-9). In answer to the question as to whether Mayflower purchased used slot machines during January 1951, petitioner stated that those records were in the Court of Appeals for the Eighth Circuit at St. Paul, Minnesota, on a different pending appeal² (R. 9). Petitioner testified that he and a clerk examined thousands of invoices for the months from January through April, 1951, but were unable to find any for second-hand machines (R. 17-18). After the court was convinced by government counsel that all the required documents (other than the exhibits in the Court of Appeals) had not been produced, it ordered the United States Marshal to impound all the Mayflower records at its place of business in St. Paul (R. 20, 23; S. R. 27-28). On April 2, 1954, F. B. I. agents started an examination of the impounded records (R. 70). On April 8, the court granted

² This case was *Nilva v. United States*, 212 F. 2d 115 (C. A. 8), certiorari denied, 348 U. S. 825, involving a Nilva other than petitioner.

government counsel a recess of one day in the Christianson retrial in order to permit further examination of the voluminous, additional Mayflower records produced (S. R. 33-35).

The records produced by petitioner in response to the subpoenas are Respondent's Exhibits 5 through 15 in the contempt hearing (S. R. 54-58). They show only that Mayflower purchased 78 slot machines between September 20, 1950, and December 29, 1950 (Ex. 14; S. R. 57, 58), and sold at least 64 slot machines between November 16, 1950, and December 28, 1950 (Ex. 8, 14; S. R. 55, 57).

At the Christianson retrial, F. B. I. agent Peterson, testifying on April 12, 1954, from summaries he had made after the intensive examination of the impounded records (R. 68-71), stated that they showed the purchase of 16 slot machines during November, 1950, 94 during December, 1950, 81 during January, 1951, and 7 during February, 1951 (R. 73, 74, 87). As to sales, Peterson testified that the impounded records disclosed that Mayflower sold 17 slot machines during November, 1950, 278 during December, 1950, 526 during January, 1951; and one during February, 1951 (R. 88, 90). The former Mayflower bookkeeper, Christensen, testified at the Christianson retrial that Baeder's ledger sheet (Plaintiff's Ex. No. 52; S. R. 61) and Sande's ledger sheet (Plaintiff's Ex. No. 94; S. R. 65)

were not complete (S. R. 37).³ As to Ex. No. 94 (Sande's ledger sheet), he testified that under instructions from petitioner, prior to the first Christianson trial, he removed certain invoices and replaced them with slips of paper; that Ex. No. 52, prepared by him under instructions from petitioner, was not a true copy of Baeder's account because the invoice covered four slot machines purchased by Baeder which were not put on this account (S. R. 37.) The slips of paper referred to were found among the records impounded by the marshal (S. R. 63, 68).

On April 15, 1954, petitioner was subpoenaed before the court and ordered not to leave without the court's permission. Petitioner replied, "I will be pleased to comply with the order of the Court" (S. R. 39). The court ordered petitioner to produce the records he had previously brought in answer to the subpoenas. Petitioner mentioned that, while he had asked the advice of an attorney in the proceeding, he was "not looking for any legal technicalities or to assert any" and that he did not need any lawyer to represent him. The court repeated the admonition against petitioner's leaving, and petitioner stated that he certainly would not leave without the court's permission. (S. R. 43-44.) The court impressed upon all parties that its order about an impending contempt proceeding against petitioner

³ Baeder and Sande were purchasers of slot machines from Mayflower.

should not be mentioned, so that the jury might not know of it, or be influenced by it, while the Christianson retrial was still in progress (S. R. 44; R. 35).

On April 22, 1954, the jury found the defendants guilty in the Christianson retrial (S. R. 20). On April 23, the court issued an order (R. 2-4) upon petitioner, pursuant to Rule 42 (b), F. R. Crim. P. (*supra*, p. 4), to appear on April 27, and show cause why he should not be held in criminal contempt for obstructing the administration of justice by (1) false and evasive testimony on April 1, 1954, upon answering the subpoenas *duces tecum*; (2) disobedience to subpoena No. 78 in not producing 5 specific items; (3) disobedience to subpoena No. 160 and to the court's order of March 29, 1954, directing Mayflower to produce forthwith 22 specific items.

On the morning of April 27, 1954, petitioner's counsel requested a bill of particulars and an extension of time (R. 28-33). The motion for a bill of particulars was denied, but the hearing was continued until 3:00 p. m. of that day (R. 36, 35). The court expressly ordered that petitioner's counsel should have access to all of the impounded Mayflower records (R. 35).

Upon resumption of the hearing at 3:00 p. m., at petitioner's request, the transcript of his testimony of April 1, 1954, a copy of which he admitted receiving on April 16, was made part of

the record, and so also were subpoenas No. 78 and No. 160 (R. 38, 37). Petitioner testified in his own behalf (R. 38, ff). As to specification No. 3, the books and records which had been obtained after impounding by the marshal, and which petitioner was charged with having failed to produce, were before the court (R. 42-43) and petitioner admitted that he had not brought them pursuant to the subpoena (R. 42-43, 46-54).^{*} When questioned about the 22 items mentioned in that specification (No. 3) he admitted that he had not examined more than half of them, his excuses ranging from "I couldn't find that" to "I don't think there were any" (R. 46-54).

Upon the Government's motion, the transcript of the testimony of F. B. I. agent Peterson in the Christianson retrial (R. 68-100) was admitted in evidence, over petitioner's objection that this was hearsay and that he was deprived of the opportunity of cross-examining Peterson (R. 59-61). This colloquy took place (R. 60, 61):

Mr. DIBBLE [Government Attorney]. I think that [the transcript of Peterson's testimony] was part of the record of this Court and it was made in the presence of the Court. It constitutes part of the record to establish the importance of the records that [petitioner] did not bring in.

The COURT. Well, that seems proper to the Court. In fact, it seems to me that in

^{*} The five items listed under specification No. 2 were not produced at all.

this proceeding there ought to be included any pertinent part of the record or the files in the preceding case, because this contempt proceeding arose out of [petitioner's] actions in the case of *United States v. Christianson, et al.*

* * * *

I think the record in this proceeding ought to disclose the fact that this [petitioner] was an attorney of record for the defendant Paster in the case we have just completed trying. The objection is overruled.

Petitioner then stated that, although he had been an attorney of record for Paster, he did not sit at the counsel table and took no part in the proceedings (R. 61-62).

At the conclusion of the hearing, the court found petitioner guilty of all three specifications in the contempt citation, and imposed a sentence of imprisonment for one year and one day (R. 67). On appeal, the Court of Appeals unanimously affirmed (Pet. App. 5a-18a).

ARGUMENT

1. Petitioner's general sentence for a year and a day may be sustained on the basis of specification No. 3 alone, the specification which charged him with having willfully disobeyed a subpoena and the order of the court for the production of certain records of the Mayflower Company (*supra*, p. 9). See *Hirabayashi v. United States*, 320

U. S. 81, 85; *Pinkerton v. United States*, 328 U. S. 640, 641-642, fn. 1.

The fact of non-production was not in dispute and proof of such fact did not depend upon the Peterson testimony at the Christianson retrial, the admissibility of which is the principal issue raised by the petition for certiorari (Pet. 12-16). Non-production was adequately shown by the transcript of petitioner's testimony at the April 1 hearing, as well as by petitioner's subsequent admissions at the contempt hearing (see *supra*, pp. 9-10). That the records were in existence at the time the subpoena was served, and the order issued, was proved by the fact that the records were actually before the court at the contempt hearing. This made out a *prima facie* case of willful disobedience of the order of the court so as to constitute contempt under 18 U. S. C. 401 and willful non-compliance with the subpoena under Rule 17 (g) F. R. Crim. P. *Patterson v. United States*, 219 F. 2d 659, 660 (C. A. 2); *Lopiparo v. United States*, 216 F. 2d 87, 91-92 (C. A. 8), certiorari denied, 348 U. S. 916.

It was then for petitioner to go forward with his proof that his disobedience was with "adequate excuse." See Rule 17 (g); *London Guarantee & Accident Co. v. Doyle & Doak*, 134 Fed. 125, 128 (C. C. E. D. Pa.). If he thought any information from Peterson would aid his position that the records were hard to find, it was his duty to adduce such testimony. For the prosecution's burden of

establishing non-compliance, the Peterson testimony added nothing to what the books and petitioner's admissions themselves showed.

Manifestly, petitioner could not absolve himself from the contempt charge merely by testifying that he could not find the records mentioned in the subpoenas, that he did not think there were such records, and that he produced whatever he was able to find (R. 48-50, 52-54, 58). The fact that he did not make a good faith search for the required records—regardless of his protestations of having done all he possibly could to comply with the subpoenas—is apparent from the fact, as observed by the court below (Pet. App. 14a), that “practically all of the records called for by the subpoenas were later found when the records were impounded and examined.”

In view of the sufficiency of the proof and the propriety of the procedure as to specification No. 3,⁵ the main issues raised by the petitioner are not really in this case and need not be considered by the Court.⁶ Specification No. 3, alone, can support

⁵ There is a suggestion in the opinion of the Fifth Circuit in *Matusow v. United States* (No. 15527), decided January 27, 1956, relied on by petitioner, that under 18 U. S. C. 402, a defendant tried for contempt for disobedience of an order is entitled to a jury trial. The court failed to note that 18 U. S. C. 402 specifically provides that it does not apply to contempts for disobedience of orders entered in suits brought by the United States.

⁶ Other points urged by petitioner which can be said to go to specification No. 3 are insubstantial (Pet. 24-26):

(1) Petitioner had sufficient time to prepare his defense,

the verdict, and since it seems evident that the sentence was basically for flouting of the court's order in failing to produce records which petitioner could readily have produced, there is no occasion to reach the more difficult questions petitioner raises as to specifications Nos. 1 and 2.

2. Petitioner's principal contentions relate to the proof on specification No. 1 that he gave false and evasive testimony. He argues that at the contempt hearing he was illegally deprived of the right to confrontation and cross-examination of FBI agent Peterson when only a transcript of petitioner's testimony was introduced to prove that he had testified falsely when he stated in effect that he had produced all the records called for in the subpoenas. He also argues that the courts below erred in upholding the procedure

in view of the fact that the contempt was committed on April 1; that he was put on notice that his misconduct had been discovered when the records he failed to produce were impounded on the next day; that on April 15 he promised the court he would not leave its jurisdiction; that the order to show cause why he should not be adjudged guilty of criminal contempt was issued on April 23; and that it was not until April 27 that the contempt hearing was held.

(2) The subpoena was limited in scope, and did not have a catch-all provision such as that in *Bowman Dairy Co. v. United States*, 341 U. S. 214, 221.

(3) Petitioner's sentence of one year and a day was imposed only after a very careful consideration of his offense as being aggravated by reason of the fact that he was an experienced attorney (Pet. App. 2a-4a), and the sentence was not an abuse of the court's discretion. Cf. *Hallinan v. United States*, 182 F. 2d 880, 887-888 (C. A. 9), certiorari denied, 341 U. S. 952; *Sacher v. United States*, 343 U. S. 1.

on the ground that he could have been summarily punished for contempt in the presence of the court, under Rule 42 (a). Although we believe that they need not be reached, we discuss these issues because of their prominence in the petition and in the opinion of the court below.

(a). Petitioner's testimony at the Christianson retrial was based upon summaries made from impounded Mayflower books and records. Before the contempt hearing, the court expressly ordered that petitioner's counsel should have access to all of the impounded Mayflower records (R. 35). Petitioner thus had an opportunity to check Peterson's testimony with the records for any inaccuracies, and could have subpoenaed Peterson as a witness at the contempt hearing if he had so desired. If this had been done and Peterson's testimony had disclosed discrepancies, the court undoubtedly would have permitted petitioner's counsel to ask Peterson leading questions as part of an effective right of cross-examination. Even now there is no contention that Peterson's testimony was inaccurate. Moreover, the Peterson testimony proved no more than did the books actually before the court, *i. e.*, that petitioner's testimony was false when he said that he could not find the records.

Nevertheless, Peterson did not appear at the contempt hearing and there may well have been a violation of the rule of confrontation which was not cured by the fact that petitioner was attorney

the verdict, and since it seems evident that the sentence was basically for flouting of the court's order in failing to produce records which petitioner could readily have produced, there is no occasion to reach the more difficult questions petitioner raises as to specifications Nos. 1 and 2.

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Nevertheless, Peterson did not appear at the contempt hearing and there may well have been a violation of the rule of confrontation which was not cured by the fact that petitioner was attorney

of record at the Christianson retrial, since he presumably would not there have been able to cross-examine as to matters not relevant to the issues at that trial and at a time when these contempt proceedings had not been initiated.

(b). The Court of Appeals' opinion on rehearing (Pet. App. 16a-17a) suggests that petitioner could have been punished summarily under Rule 42 (a), F. R. Crim. P., and therefore received more than his due when the trial court elected to proceed under Rule 42 (b). We are very doubtful that the contempts charged here could have been dealt with summarily under Rule 42 (a) (see *Nye v. United States*, 313 U. S. 33; *In re Oliver*, 333 U. S. 257; *In re Murchison*, 349 U. S. 133; *Matusow v. United States*, C. A. 5, No. 15527, decided January 27, 1956; cf. *Cammer v. United States*, No. 110, this Term, decided March 12, 1956), but the observation of the court below was no more than dictum since the District Court had deliberately proceeded under Rule 42 (b), and the Court of Appeals expressly held that, in its view, all rights available under the latter provision had been accorded petitioner (Pet. App. 17a).

(c) Perhaps a more difficult problem under the first specification, which is raised only inferentially in the petition, is whether the false testimony with respect to the books and records needed for the then pending trial was so clearly obstructive of justice, beyond that involved in perjury alone, as to differentiate this case from *In re*

Michael, 326 U. S. 224, and thus to render the false testimony a proper basis for contempt proceedings at all. Although there can be no question but that the non-compliance with the order and subpoena was a contempt, it is much more debatable whether the false and evasive testimony was, separate from the non-compliance, an independent basis for the contempt charged in specification No. 1. Cf. *Cammer v. United States*, No. 110, this Term, decided March 12, 1956.⁷

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is supported by the third specification, and the Court need not

⁷ Specification No. 2 was based on non-compliance with the subpoena in that certain records were never produced. There was no proof that these particular records were actually in existence at the time the subpoena was served. Normally, the government and the court would be justified in indulging in the presumption that records which a corporation would normally keep and which related to events not too far in the past were in existence and that, if they were not, it was up to the person subpoenaed to explain their non-production. *Lopiparo v. United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916; see also *Green v. United States*, 193 F. 2d 111 (C. A. 2). However, here the testimony of Mayflower's bookkeeper, which was not introduced at the contempt hearing but which was referred to by the Court of Appeals, tended to suggest that the records had been removed before the subpoena was served. Whatever obstruction might have been involved in that act, the testimony did tend to negative present existence of the records and therefore to raise a question as to the ability to comply with the subpoena. See *Patterson v. United States*, 219 F. 2d 659 (C. A. 2).

consider the other two specifications. The petition for a writ of certiorari should be denied.

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MARCH 1956.